STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2014
v	No. 304407 Wayne Circuit Court
MARLO DARIUS BROWN, Defendant-Appellant.	LC No. 11-001104-FH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of attempted first-degree home invasion, MCL 750.92 and MCL 750.110a(2); second-degree home invasion, MCL 750.110a(3); receiving or concealing stolen property valued at $200 or more but less than $1,000 (second or subsequent offense), MCL 750.535(3)(b); and third-degree fleeing and eluding a police officer, MCL 257.602a(3). The trial court sentenced defendant to concurrent prison terms of 9 to 16 years for the second-degree home invasion conviction, one to five years each for the attempted first-degree home invasion and fleeing-and-eluding convictions, and two years' probation for the conviction of receiving or concealing stolen property. Defendant appeals as of right. We affirm. However, we note that the judgment of sentence is at variance with the sentences as announced at sentencing and as recited in defendant's appellate brief. We thus remand this case for the ministerial task of correcting the judgment of sentence.

Defendant's convictions arose from two separate incidents, both of which occurred on January 18, 2011, in Canton, Michigan. In the first incident, someone broke into the home of Dennis Matthews and stole several items, including a new television still in its box. In the second incident, a person broke the glass on the front door of the home of Edward and Veronica Fair, but then ran off. The Fairs, who were home at the time, called the police, who responded within three to four minutes.

After responding to the reported break-in at the Fairs' home, the police observed defendant walking in the area. When an officer approached defendant to determine if he had witnessed anything associated with that incident, defendant fled on foot. Defendant eventually entered a vehicle and drove off. A police pursuit ended when defendant lost control of his vehicle and crashed into a tree. Defendant fled from his vehicle on foot and was eventually apprehended and arrested. After defendant was in custody, the police removed his shoes to

compare the shoe treads to prints that had been left in the snow at the scenes of both incidents. The police also discovered, in the backseat of defendant's vehicle, a new television, which was still in its box and which matched the type taken from Matthews's home.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for not moving to suppress evidence obtained by the police from both defendant's person and his vehicle. He also argues that counsel was ineffective for failing to correct police testimony that the "serial number" on the television box found in defendant's car matched the number that was listed on Matthews's receipt. After conducting an evidentiary hearing, the trial court rejected both of these claims and concluded that defendant failed to meet his burden of showing that trial counsel was ineffective.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and its constitutional determinations de novo. *Id*. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action could be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. FAILURE TO FILE A MOTION TO SUPPRESS EVIDENCE

Defendant first argues that defense counsel was ineffective for not filing a motion to suppress evidence. Defendant presents a series of arguments in which he contends that the police violated his constitutional right against an unreasonable search and seizure, see US Const, Am IV, in several respects.

Although defendant first argues that the police lacked reasonable suspicion to detain him, he does not clearly indicate at which point he believes he was unlawfully seized. We conclude that the evidence does not support any claim that defendant was unlawfully seized at any point. The testimony indicates that an officer initially approached defendant to speak to him, because defendant was observed walking in the vicinity of the Fairs' home shortly after an attempted break-in and no other individuals were observed in the area. At that point, there was no seizure and the police did not need reasonable suspicion to approach defendant to talk to him. "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). Instead of cooperating, however, defendant fled on foot to get away from the officer. Police officers are permitted to make a valid investigatory stop of a person for the purpose of investigating possible criminal behavior, even if there is no probable cause to support an arrest, if they have a reasonably articulable suspicion that criminal activity is afoot. *Id*. at 32. The Fourth Amendment is not violated as long as the officer can articulate a reasonable suspicion for the detention. *People v Custer*, 465 Mich 319, 327; 630 NW2d 870

(2001). A person's flight can contribute to the existence of reasonable suspicion sufficient to conduct an investigatory stop; indeed, in *People v Parr*, 197 Mich App 41, 43; 494 NW2d 768 (1992), this Court explained:

> Flight at the approach of police does not, by itself, support a reasonable suspicion to warrant an investigative stop; however, it is a factor to be considered in determining whether there were grounds to conclude that criminal activity was afoot. [*People v*] *Armendarez*, [188 Mich App 61, 68; 468 NW2d 893 (1991)]; [*People v*] *Lambert*, [174 Mich App 610, 616; 436 NW2d 699 (1989)]. There must be other circumstances that make the import of the defendant's flight less ambiguous. *Id*.

In this case, the police were aware that there had been criminal activity at the Fairs' house. Defendant's close proximity to that crime scene, in an area where no one else was present and in combination with his flight from the police, gave the police reasonable suspicion to pursue and detain defendant for an investigatory stop.

Subsequent events gave the police probable cause to arrest defendant. In *People v Chapo*, 283 Mich App 360, 366-367; 770 NW2d 68 (2009), this Court explained:

> A police officer may make an arrest without a warrant if there is probable cause to believe that a felony was committed by the defendant, or probable cause to believe that the defendant committed a misdemeanor in the officer's presence. MCL 764.15; *People v Dunbar*, 264 Mich App 240, 250; 690 NW2d 476 (2004) [overruled in part on other grounds by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009)]. "Probable cause is found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed." *Id*. The standard is an objective one, applied without regard to the intent or motive of the police officer. *People v Holbrook*, 154 Mich App 508, 511; 397 NW2d 832 (1986).

An officer testified that he observed defendant inside his vehicle. Defendant ignored the officer's signals to stop, ran two stop signs, exceeded the speed limit, crashed his vehicle into a tree, and then fled from the accident scene. At this point, the police clearly had probable cause to arrest defendant for fleeing and eluding a police officer, which is a felony if the violation results in a collision or accident. MCL 257.602a(3). Therefore, defendant was properly taken into custody.

After defendant was in custody, the police confiscated his shoes. They also examined the television box observed in the backseat of defendant's vehicle to determine if it matched the television identified on Matthews's receipt. Defendant argues that even if he was properly seized, the police were not authorized to remove his shoes or examine the television box without a search warrant. We disagree.

Testimony indicated that that the police removed defendant's shoes primarily to determine whether defendant's shoe tread matched footprints observed at the scene of the attempted home invasion. Defendant had no reasonable expectation of privacy in the appearance

of his shoes at the time of his arrest; indeed, Fourth Amendment concerns are only implicated when the police infringe upon a defendant's reasonable expectation of privacy. *People v Calvin Jones*, 260 Mich App 424, 428-429; 678 NW2d 627 (2004) (a person does not have a reasonable expectation of privacy in an openly displayed vehicle license plate). One does not have a reasonable expectation of privacy with regard to the physical characteristics of the soles of his shoes. See *State v Curry*, 103 Idaho 332, 338; 647 P2d 788, 794 (1982).

In addition, the police would, at any rate, have been able to seize defendant's shoes a short time later, after he was taken into formal custody. It is not unreasonable for the police to examine and hold as evidence a defendant's personal effects after he has been taken into custody pursuant to a lawful arrest. *People v Brooks*, 405 Mich 225, 247-248; 274 NW2d 430 (1979); *People v Nesbitt*, 159 Mich App 740, 744; 407 NW2d 4 (1987). As previously indicated, defendant was already under lawful arrest for fleeing and eluding a police officer.

Defendant also argues that the police conducted an improper warrantless search of the television box in defendant's car when they moved the box to locate the model number, in order to compare it to the model number for the television taken from Matthews's house. Defendant argues that the search was not justified under the plain-view exception to the warrant requirement because the model number on the box was not in plain view. See *People v Antwine*, 293 Mich App 192, 201; 809 NW2d 439 (2011) (discussing the plain-view exception). However, we agree with the trial court that defendant abandoned his vehicle when he ran off after crashing it. *People v Mamon*, 435 Mich 1, 6-7; 457 NW2d 623 (1990). The rule regarding abandonment has been applied to vehicles left behind when a suspect flees from the police. See *United States v Edwards*, 441 F2d 749, 751-753 (CA 5, 1971). Defendant has not established that he did not leave his vehicle voluntarily or that his flight from the police was due to any police misconduct. *United States v Cooley*, 552 F Supp 2d 1284, 1292 (ND Ala, 2008). Therefore, defendant has no basis to challenge the search of the vehicle, including the television and its model number.

In addition, because of defendant's arrest and the involvement of his vehicle in an accident, the police had the authority to impound the vehicle to prevent disruption of traffic or preserve evidence. See *South Dakota v Opperman*, 428 US 364, 368-369; 96 S Ct 3092; 49 L Ed 2d 1000 (1976). Thus, the police would have eventually discovered the television and determined its model number when the contents of the vehicle were inventoried. Because the police would have eventually learned, through other valid means, the model number of the television in defendant's vehicle, the inevitable-discovery doctrine would have precluded suppression of that evidence. *People v Hyde*, 285 Mich App 428, 439-440; 775 NW2d 833 (2009).

For the foregoing reasons, any motion to suppress the evidence obtained either from defendant's person or his vehicle would have been futile. Counsel is not ineffective for failing to raise a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

B. SCOPE OF CROSS-EXAMINATION

Defendant also argues that defense counsel was ineffective for not cross-examining a police officer to clarify that the number on the television box in defendant's car and the number

on Matthews's receipt was only a model number, i.e., a number common to many televisions of the same model, and not an actual serial number, i.e., a number unique to a specific television. At the evidentiary hearing, defense counsel admitted that he was not aware of the distinction. Counsel explained that he did not question the officer's reference to a "serial" number because he had no reason to believe that the officer would lie about the numbers being an exact match. We agree that it was not objectively reasonable for defense counsel not to carefully examine the receipt or determine what the numbers actually meant, and to instead simply accept the officer's testimony as accurate without considering whether the officer was mistaken or may have been misleading the jury. However, we conclude that defendant was not prejudiced by this deficiency. Although clarifying testimony would have diminished the strength of the invoice-number evidence, it would not have significantly weakened the probative value of that evidence in linking defendant to the Matthews's home invasion. The fact that defendant was in possession of a new television of the same model as the new television taken from Matthews's home would have still been strong circumstantial evidence linking defendant to the home invasion at Matthews's residence. Other evidence, including footprints in the snow at Matthews's home that matched defendant's shoes, also linked defendant to that offense. In addition, the testimony indicated that defendant gave inconsistent accounts concerning where he allegedly obtained the television that was found in his car. In view of this evidence, there is not a reasonable probability that the result of the trial would have been different but for counsel's failure to elicit the clarifying testimony. Accordingly, defendant has not sustained his burden of establishing that counsel was ineffective.

II. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that the police lacked probable cause to arrest him. As previously explained in section I(A), *supra*, defendant was not unlawfully seized when an officer initially approached him for questioning, and the police were subsequently permitted to pursue defendant and detain him for an investigatory stop based on his proximity to the crime scene, the absence of anyone else in the area, and his flight when approached by the police—the totality of which gave rise to a reasonable, articulable suspicion of defendant's involvement in the recent crime at the Fairs' house. *Custer*, 465 Mich at 327. The police thereafter had probable cause to arrest defendant after he ignored police signals to stop his vehicle, ran two stop signs, exceeded the speed limit, crashed his vehicle into a tree, and fled the accident scene. *Chapo*, 283 Mich App at 366-367.

Defendant presents additional arguments challenging the seizure of his shoes and the search of the television box inside his vehicle. As previously discussed in section I, *supra*, the actions of the police with regard to those items provide no basis for reversal.

Defendant raises additional arguments regarding the admission of evidence, none of which are properly before this Court because they are not set forth in the statement of questions presented in his brief. *Fonville*, 291 Mich App at 383. Further, defendant's additional issues were not preserved with appropriate objections at trial. Therefore, our review is limited to ascertaining whether plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although defendant argues that the prosecution improperly introduced a photograph of Matthews's television in lieu of the actual

television, defense counsel affirmatively indicated at trial that he had no objection to the admission of the photograph. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver," which extinguishes any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

At any rate, there is no merit to defendant's various arguments. For example, defendant argues that admission of the photograph violated MRE 612(c). That rule relates to writings or objects used to refresh a witness's memory, and a party's right to inspect such a writing and use it for cross-examination. Because the photograph was not used to refresh a witness's memory, MRE 612(c) is not applicable. Defendant also refers to the state's duty to preserve and disclose material exculpatory evidence, *Arizona v Youngblood*, 488 US 51, 55, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988), and suggests that the state violated this duty by failing to preserve and present the actual television at trial. However, defendant has not provided any basis for concluding that the television was exculpatory. Further, the record does not support defendant's argument that the police failed to preserve this evidence. Matthews testified at trial that the television was returned to him later in the evening on the date of the offense. Defendant does not claim that he ever requested an opportunity to examine or inspect the television and was not permitted to do so.

We find no basis for reversal with regard to any of the arguments raised in defendant's supplemental brief.

We affirm defendant's convictions and sentences but remand this case for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder